

BRB No. 05-0734

ALICE NEWTON (Widow of JOSEPH
NEWTON, JR.)

Claimant-Petitioner

v.

VIRGINIA INTERNATIONAL
TERMINALS

and

VIRGINIA PROPERTY AND CASUALTY
INSURANCE GUARANTY ASSOCIATION

Employer/Carrier-
Respondents

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR

Party-in-Interest

DATE ISSUED: 03/28/2006

DECISION and ORDER

Appeal of the Order on Petition for Attorney's Fees of Larry W. Price,
Administrative Law Judge, United States Department of Labor.

Karen M. Rye, Virginia Beach, Virginia, for claimant.

F. Nash Bilisoly and Linda L. Thatch (Vandeventer Black LLP), Norfolk,
Virginia, for employer/carrier.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Order on Petition for Attorney's Fees (2002-LHC-0577) of
Administrative Law Judge Larry W. Price rendered on a claim filed pursuant to the

provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Decedent injured his back during the course of his employment for employer on December 16, 1982. In a decision issued on September 25, 1986, decedent was awarded compensation for permanent total disability, and employer was awarded relief from continuing compensation liability, pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Decedent's death from a stroke occurred on May 7, 2000. Decedent's treating physician opined that the death was related to the work injury. In a decision issued on October 16, 2003, Administrative Law Judge Campbell awarded claimant death benefits, ordered employer to pay claimant \$3,000 for decedent's funeral expenses, 33 U.S.C. §909, and found employer entitled to Section 8(f) relief on the death benefits claim.

Claimant's counsel filed a fee petition for work performed before the administrative law judge, requesting a fee of \$5,557.25. Employer objected to its liability for an attorney's fee on the ground that it had never contested claimant's entitlement to death benefits, and that it timely paid claimant's claim for funeral expenses. In his Order on Petition for Attorney's Fees, Administrative Law Judge Price agreed with employer's contentions and found that employer is not liable for claimant's attorney's fee.¹ The administrative law judge therefore denied the fee petition.

On appeal, claimant's counsel argues that the administrative law judge erred by not addressing claimant's or the Special Fund's liability for counsel's fee. Employer responds that the administrative law judge correctly concluded it is not liable for claimant's attorney's fee.

An attorney's fee must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, Section 702.132, 20 C.F.R. §702.132. Under Section 28(a) of the Act, if an employer declines to pay any compensation within 30 days after receiving written notice of a claim from the district director, and the claimant's attorney's services result in a successful prosecution of the claim, claimant is entitled to an attorney's fee payable by employer. 33 U.S.C. §928(a). Under Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by

¹ The case was re-assigned to Judge Price due to the retirement of Judge Campbell.

the employer. 33 U.S.C. §928(b). *See generally Virginia International Terminals, Inc. v. Edwards*, 398 F.3d 313, 39 BRBS 1(CRT), (4th Cir. 2003), *cert. denied*, 126 S.Ct. 478 (2005). If Section 28(a) or (b) does not apply, an attorney's fee may be made a lien upon the compensation due to claimant pursuant to 33 U.S.C. §928(c). *See generally Boe v. Dept. of the Army/MWR*, 34 BRBS 108 (2000). Under such circumstances, any fee approved must take into account the financial circumstances of the claimant. 20 C.F.R. §702.132(a).

We agree with counsel that the case must be remanded for the administrative law judge to consider claimant's liability for a fee for services rendered while this case was before the administrative law judge.² Claimant's counsel, in conformance with 20 C.F.R. §702.132, presented the administrative law judge with a fee petition itemizing the services she rendered on behalf of claimant while this case was pending before the administrative law judge. Moreover, in her May 24, 2004, letter attached to the petition, counsel stated, "[I]n the absence of an assessment against the employer or the Special Fund, I respectfully request approval to collect such fee from the claimant." The administrative law judge did not address claimant's liability for a fee as a lien on her compensation award. Accordingly, we remand this case for the administrative law judge to address claimant's liability for a fee pursuant to Section 28(c) and 20 C.F.R. §702.132.

² The Special Fund cannot be held liable under the Act for attorney's fees. *See generally Boland Marine & Manufacturing Co. v. Rihner*, 41 F.3d 997, 29 BRBS 43(CRT) (5th Cir. 1995); *Director, OWCP v. Robertson*, 625 F.2d 873, 12 BRBS 550 (9th Cir. 1980). In addition, counsel does not raise any error in the administrative law judge's finding that employer cannot be held liable for her attorney's fee.

Accordingly, the case is remanded for the administrative law judge to address claimant's liability for her attorney's fee. In all other respects, the Order on Petition for Attorney's Fees is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge